IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2012 04538

KATHERINE ROWE — Plaintiff

v

AUSNET ELECTRICITY SERVICES PTY LTD
(ACN 064 651 118) (FORMERLY SPI ELECTRICITY PTY LTD)
& ORS — Defendants

JUDGE:	JOHN DIXON J
WHERE HELD:	MELBOURNE
DATE OF HEARING:	21 JUNE 2016 (Further material filed 30 June 2016)
DATE OF RULING:	26 JULY 2016
CASE MAY BE CITED AS:	ROWE v AUSNET ELECTRICITY SERVICES PTY LTD & ORS (RULING No 7)
MEDIUM NEUTRAL CITATION:	[2016] VSC 424

PRACTICE AND PROCEDURE – Group proceedings – Administration of approved settlement scheme – Approval of administration costs.

APPEARANCES:	Counsel	Solicitors
For the Scheme Administrator	Mr A Watson, the Scheme Administrator, appeared in person	Maurice Blackburn

HIS HONOUR:

1 On 27 May 2015, Emerton J authorised the plaintiff for and on behalf of the group members and each of them to enter into and give effect to a Deed of Settlement ('Deed') that effected a compromise of this proceeding. By that order, I was nominated as the supervising judge with respect to the Deed and the Settlement Distribution Scheme ('SDS') that it created.[1]

2 There is an identical settlement distribution scheme established in respect of the Kilmore-East Kinglake group proceeding that is being supervised by J Forrest J. The scheme administrator has taken advantage of the efficiencies that flow from administering both schemes through a single process. However, I am only concerned to supervise the Murrindindi settlement.

3 A joint case management conference was convened on 21 June 2016 for the Scheme Administrator, Mr Andrew Watson, to report to the Court on the progress of the Murrindindi administration.

4 The Scheme Administrator earlier filed an affidavit sworn 16 March 2016, and a confidential affidavit filed 22 March 2016, that explained in some considerable detail the progress of the administration of the scheme. He has filed two further affidavits sworn 16 and 20 June 2016 respectively. I have carefully considered each of these affidavits and heard from Mr Watson at the case management conference.

5 The object of the scheme is to distribute the settlement sum of $300,000,000 amongst the group members whose claims in total are expected to exceed the amount available for distribution. It is only when the assessments have been substantially completed that the Scheme Administrator is in a position to determine the dividend to be paid from the scheme in settlement of the claims.

6 A reasonably detailed explanation of the structure and processes of the settlement schemes now collectively operating for the Murrindindi and Kilmore-East Kinglake

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1 A copy of the Deed and SDS is available on the Court website at: http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/murrindindi+black+saturday+bushfire+class+action

has previously been set out and I need not repeat it.[2] Further J Forrest J has published his ruling in respect of the Kilmore-East Kinglake SDS following the case management conference on 21 June 2016.[3]

7 I accept that the SDS is moving at an appropriate pace towards distributions being made and the Scheme Administrator has taken a number of steps to avoid delays in the assessment process. I agree with the observations made by J Forrest J in respect of the time being taken to complete the distribution of the settlement and I express my satisfaction with the efforts being made by the Scheme Administrator to minimise delay and expense and in ensuring that the scheme is fairly administered.

8 One specific issue remained over from the case management conference and later further material was filed.

9 On 6 May 2016, I made the following orders.

> 1. Pursuant to r.50.01 of the Supreme Court (General Civil Procedure) Rules 2005 ('Rules'), Mr John White is appointed as a special referee.
>
> 2. The special referee shall report in writing to the Court on the question set out in Annexure A to these orders and state his opinion in that report with reasons.
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> 3. The special referee shall provide a report under paragraph 2 on each occasion that approval is sought from the Court for payment of the costs of administering the Settlement Distribution Scheme, commencing with those sought at the case management conference of 23 March 2016.
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> 4. Pursuant to r.50.06 of the Rules, the special referee shall be remunerated by the plaintiff from the Settlement Distribution Fund as part of the costs of the settlement distribution process.

Annexure A stated:

> Questions
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> 1. Are the costs sought in relation to the administration of the settlement distribution scheme reasonable?

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2 *Matthews v AusNet Electricity Services Pty Ltd (Ruling No. 40)* [2015] VSC 131, *Rowe v AusNet Electricity Services Pty Ltd (Ruling No. 6)* [2016] VSC 166, *Matthews v AusNet Electricity Services Pty Ltd (Ruling No. 41)* [2016] VSC 171.

3 *Matthews v AusNet Electricity Services Pty Ltd (Ruling No. 42)* [2016] VSC 394.

2. If not, in what amount should the costs be disallowed?

10 The purpose of Mr White's appointment was to ensure that the Scheme Administrator's costs, payable out of the settlement funds and the interest earned on the capital sum, were reasonable. Mr White's report was not available at the time of the case management conference and was completed on 30 June 2016 and filed in early July.[4]

11 To date, orders have been made permitting the disbursement of funds to Maurice Blackburn on account of scheme administration costs, subject to formal court approval, for the following periods:

(a) 13 February 2015 to 19 June 2015 - $109,078.40;

(b) 20 June 2015 to 31 January 2016 - $1,371,551.18;

(c) 1 February 2016 to 30 April 2016 - $1,011,329.56;

(d) 1 May 2016 to 30 June 2016 - $1,100,000.

12 Mr White's report provides an assessment of the reasonableness of the costs incurred in the period from 13 February 2015 to 30 April 2016 based upon an audit that he completed of those costs. Mr White's report is comprehensive and I have studied it carefully.

13 Mr White adopted a methodology based, in large part, on statements of principle by judges of the Federal Court (particularly the decision of Gordon J in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd*[5]) in assessing gross sum costs as between parties in a class action.

14 When approving the settlement Emerton J stated:[6]

143 The Scheme provides for costs incurred by the Scheme Administrator

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4 A copy of the report of Mr John White is available on the Court website at: http://www.supremecourt.vic.gov.au/home/law+and+practice/class+actions/murrindindi+black+saturday+bushfire+class+action

5 [2013] FCA 626.

6 [2015] VSC 232, [143]–[147].

and staff in connection with the assessment of claims to be paid out of the settlement sum. These administration costs are to be paid in the first instance, and hopefully entirely, from interest accruing on the settlement sum.

144 The fees charged by the Administrator and his or her staff are to be charged at the rates set out in a schedule to the Scheme. The hourly rates are submitted to be unexceptional commercial rates for legal work.

145 The Scheme provides for amounts payable to any person in respect of the administration of the Scheme to be monitored by the Court. All such amounts must be identified in a report to the Court prior to payment and may only be paid upon and to the extent of approval by the Court.

146 I am satisfied that the requirement for the approval of the Court before administration costs are paid is an appropriate safeguard. Once the implementation of the Scheme has begun, a re-assessment of the administration costs can be undertaken at any time, should it be necessary to do so.

147 The arrangements for the payment of future administration costs do not compromise the fairness or reasonableness of the settlement, in my view.

15 In the approval of compromise of the Kilmore-East Kinglake settlement, when determining the costs payable to Maurice Blackburn, Osborn JA adopted the process that has developed in the Federal Court. His Honour said:[7]

> Gordon J initially declined to accept the plaintiff's costs evidence because the affidavit of the costs consultant was found to be lacking in detail and proper analysis. A registrar of the Court was appointed to make an assessment of the costs, and a further expert opinion was sought. Gordon J accepted the methodology of the second expert, and in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd (No 3)* commented on the process undertaken by her:
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> > What then was that methodology? The task was not a taxation and no itemised bill of costs was prepared. Instead, Ms Harris considered her task by reference to the following principles:
> >
> > 1. There was a need for an appropriate balance in relation to the level of information available to the court and the costs associated with the provision of that information: *Re Medforce Healthcare Services Ltd (in liq)*;
> >
> > 2. The principles applicable to the assessment of costs on a gross sum basis provided some guidance. When assessing costs in that way the methodology adopted and information provided must enable the Court to be

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7 *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [353] and [381] (citations omitted).

confident that the approach taken is logical, fair and reasonable: *Beach Petroleum NL v Johnson (No 2)*; *Seven Network Ltd v News Ltd*; and *Leary v Leary*;

3. At a minimum, a statement of the work undertaken together with a sufficiently itemised account to enable the charges made to be related to the work done was required: *Re Medforce*;

4. The matters to be taken into account in a review of legal costs under s 3.4.44(1) of the *Legal Profession Act 2004* (Vic) (the LPA), which include whether or not it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable manner and the fairness and reasonableness of the amount of legal costs in relation to that work, as well as the matters that may be taken into account in considering what costs are fair and reasonable under s 3.4.44(2) of the LPA;

5. The considerations enunciated in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* and *Modtech Engineering Pty Ltd v GPT Management Holdings (No 2)*.

...

Moreover, the approach taken by [the costs consultant] reflects the methodological principles approved by Gordon J in *Modtech* and is very comprehensive. The detail with which the breakdown of costs is presented provides the Court with the information required for the Court to undertake an independent assessment of the overall reasonableness of the costs.

16 Applying these principles, Mr White identified the methodology that he adopted in his report in the following terms:

35. On the basis that it reflected the methodological principles approved by Gordon J in *Modtech* and was very comprehensive Osborn J[A] accepted, at paragraph 381 of his Judgment in the present matter, the following as an appropriate methodology to be utilized in determining whether gross sum costs claimed on an inter parties basis are reasonable:

(i) calculate the time spent on the proceeding by each of the lawyers and non-lawyers;

(ii) apply the Supreme Court scale rates and charges to work done by lawyers and non-lawyers;

(iii) identify and excise the number of hours relating to non-recoverable matters by reference to costs that are not claimable under the Supreme Court scales;

(iv) apply any discounts after considering the nature of the work claimed or the manner in which the work was done;

(v) apply the factor for loading for skill, care and attention as claimable under each of the old or new Supreme Court scales:

(vi) apply the complexity loading factor as provided for under the Maurice Blackburn conditional costs agreements; and

(vii) apply the factor of the 25 per cent uplift fee to professional fees on obtaining a successful outcome as claimable under the Legal Profession Act 2004 and provided for under the Maurice Blackburn conditional costs agreements.

...

40. Accordingly, bearing in mind the information that Gordon J at paragraph 37 in *Modtech* considered would be useful to the Court in assessing the reasonableness of costs and having regard to the roles of the Scheme Administrator and his staff as well as the scope of the work done by them to date and the likely scope of work still to be done by Mr Watson and his staff, I propose to adopt the following methodology:

(a) step 1 - identify the scope of work done;

(b) step 2 - identify the nature of the costs incurred over particular periods of time;

(c) step 3 - examine the copy bills of costs/tax invoices and calculate the time spent on the proceeding by each of the lawyers and non-lawyers;

(d) step 4 - examine the copy bills of costs/tax invoices and take and examine:

(i) samples of charges claimed for work done by reference to selected operators and selected dates, and

(ii) samples of disbursements claimed by reference to selected service providers and selected dates;

(e) step 5 - apply the hourly rates to be allowed to the Scheme Administrator and administrator staff as approved by the Court and detailed in Schedule B to the Scheme;

(f) step 6 - identify the number of hours relating to non-recoverable work by reason of that work not being reasonably incurred or reasonable in amount and, if any, excise that work; and

(g) step 7 - identify and, if any, reduce or deduct disbursements which appear unreasonably incurred or unreasonable in amount.

17 Mr White carried out the exercise step by step, reporting in detail on his findings. He reached the following conclusions as to the administration costs:

STEP 6 - EXCISE WORK UNREASONABLY DONE or UNREASONABLE IN AMOUNT

110. In light of my review of the materials provided to me, having regard to the outcome of the sampling process referred to as step 4(i) in paragraph 40 above and reiterating the matters generally canvassed, I do not consider it could reasonably be said that any of the work claimed in the bills of costs/tax invoices was unreasonably done or is unreasonable in amount.

STEP 7 - DISBURSEMENTS UNREASONABLY INCURRED or UNREASONABLE IN AMOUNT

111. In light of my review of the materials provided to me and reiterating the matters generally canvassed above, I do not consider that any of the disbursements claimed in the bills of costs/tax invoices were unreasonably incurred and or are unreasonable in amount.

CONCLUSION

112. Having regard to the matters canvassed in this report and the reasons expressed in paragraphs 41 to 83 and 101 to 110 above of this report the quantum of charges claimed in the bills of costs/tax invoices covering the period 13 February 2015 to 30 April 2016 is reasonable.

113. Having regard to the matters canvassed in this report and the reasons expressed in paragraphs 41 to 68, 84 to 100 and 111 above of this report the quantum of disbursements claimed in the bills of costs/tax invoices covering the period 13 February 2015 to 30 April 2016 is reasonable.

18 I am satisfied that Mr White's methodology is appropriate and his work has been performed competently and thoroughly. I am persuaded that the costs charged by the Scheme Administrator for the period 13 February 2015 to 30 April 2016 are reasonable. I declare that the payments made to the Administrator pursuant to the SDS and pursuant to my orders set out above are reasonable and that no amount is required to be refunded by the Administrator.

19 Further joint case management conferences in conjunction with the Kilmore-East Kinglake SDS are scheduled for 12 September 2016 and 14 November 2016 at 9:30 am. I will direct that the Scheme Administrator file an affidavit informing the court of the progress of the administration in the Murrindindi SDS 7 days prior to each conference.

CERTIFICATE

I certify that this and the 7 preceding pages are a true copy of the reasons for ruling of John Dixon J of the Supreme Court of Victoria delivered on 26 July 2016.

DATED this 26th day of July 2016.

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Associate